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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SAMUEL W. GIBBS 111,

Plaintiff,

v.

DOUG SMITH,

Defendant.

Case No.: 3:19-cv-00580-MMD-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF Nos. 1, 1-1

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The

1 application must be made on the form provided by the court and must include a financial affidavit
2 disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
8 therefore, the application should be granted.

9 **II. SCREENING**

10 **A. Standard**

11 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the
12 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
13 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
14 who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks
17 that language. As such, when reviewing the adequacy of a complaint under this statute, the court
18 applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d
19 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a plaintiff has failed to state a
20 claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule
21 of Civil Procedure 12(b)(6) standard for failure to state a claim."). Review under Rule 12(b)(6) is
22 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723
23 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395
3 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less stringent
4 standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)
5 (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
7 action," it must contain factual allegations sufficient to "raise a right to relief above the speculative
8 level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain
9 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
10 cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff
11 should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see*
12 *also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff, who indicates he resides in Herlong, California, is suing defendant Doug Smith—
19 Plaintiff's former landlord—for defamation related to statements Smith allegedly made in an
20 eviction proceeding in the Sparks Civil Court on March 30, 2018 that Plaintiff claims are false. He
21 avers that the statements made to the court in the eviction proceeding resulted in he and his family
22 being evicted from the property.

1 While there may be a basis for jurisdiction under the diversity statute, presuming Smith is
 2 a resident of Nevada, Plaintiff fails to state a claim upon which relief may be granted. In Nevada,
 3 it is a "long-standing common law rule that communications [made] in the course of judicial
 4 proceedings [even if known to be false] are absolutely privileged." *Circus Circus Hotels v.*
 5 *Witherspoon*, 657 P.2d 101, 104, 99 Nev. 56, 60 (1983). The applicability of the absolute privilege
 6 is a matter of law for the court to decide. *Id.*, 657 P.3d at 105. The privilege is not limited to
 7 statements made by attorneys. Instead, "[t]he purpose of the absolute privilege is to afford all
 8 persons freedom to access the courts and freedom from liability for defamation where civil or
 9 criminal proceedings are seriously considered." *Clark County School Dist. v. Virtual Educ.*
 10 *Software, Inc.*, 213 P.3d 496, 502, 125 Nev. 274, 383 (2009) (citing Restatement (Second) of Torts
 11 § 587 cmts. a, e (1977)).

12 The allegations of the complaint are that Smith made statements in a judicial proceeding
 13 for eviction that Plaintiff claims were false, and therefore defamatory. On the face of the complaint,
 14 the statements made by Smith are privileged and he is not subject to liability for defamation.
 15 Therefore, this action should be dismissed with prejudice.

16 **III. RECOMMENDATION**

17 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

18 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain
 19 this action without prepaying the filing fee or giving security therefor. This order granting
 20 IFP status does not extend to the issuance of subpoenas at government expense.

21 (2) The complaint (ECF No. 1-1) should be **FILED**.

22 (3) The action should be **DISMISSED WITH PREJUDICE** for failing to state a claim
 23 upon which relief may be granted.

1 The Plaintiff should be aware of the following:

2 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
3 this Report and Recommendation within fourteen days of being served with a copy of the Report
4 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report
5 and Recommendation” and should be accompanied by points and authorities for consideration by
6 the district judge.

7 2. That this Report and Recommendation is not an appealable order and that any notice of
8 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
9 until entry of judgment by the district court.

10 Dated: December 13, 2019.

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12 William G. Cobb
13 United States Magistrate Judge
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